Supreme Court, U.S.
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No. 05-_____

In The
Supreme Court of the United States

JOHN GARAMENDI, in his capacity as Commissioner of Insurance for the State of California,

Petitioner,

v.

GERLING GLOBAL REINSURANCE CORPORATION OF AMERICA, US BRANCH, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether a plaintiff who has lost his 42 U.S.C. § 1983 civil rights claim on the merits in the lower court may nevertheless be assumed to have prevailed on that claim for purposes of awarding attorneys' fees under 42 U.S.C. § 1988 when a reviewing court declines to rule on that failed claim.

2. Whether this Court's grant of certiorari on a Section 1983 claim that the petitioner lost in the court of appeals creates an assumption for purposes of awarding fees that the petitioner prevailed on that claim when this Court ultimately does not decide that claim.

3. Whether the federal government's preemption of a state statute through the exercise of its foreign affairs power creates individual Section 1983 rights for a plaintiff challenging the statute on such preemption grounds, thereby providing a basis for attorneys' fees under Section 1988.

LIST OF PARTIES

The petitioner is John Garamendi in his capacity as the Commissioner of Insurance for the State of California.

The respondents are: Gerling Global Reinsurance Corporation of America, US Branch; Gerling Global Life Reinsurance Company; Gerling Global Life Insurance Company; Gerling America Insurance Company; Constitution Insurance Company; Revios Reinsurance Canada, Ltd.; Revios Reinsurance U.S., Inc.; Assucrazioni Generali S.P.A.; American Insurance Association; and American Re-Insurance Company.

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OPINIONS BELOW

The initial opinion of the court of appeals reversing the district court's decision denying attorneys' fees to respondents is reported at 400 F.3d 803. That opinion was amended in connection with the court of appeals' order denying the Commissioner's petition for rehearing. That order is reported at 410 F.3d 531. The opinion as amended appears in the Appendix (App., *infra*, 1-19). The district court's opinion denying attorneys' fees (App., *infra*, 20-26) is unpublished. The opinion of the court of appeals reversing the district court's permanent injunction and granting the Commissioner summary judgment is reported at 296 F.3d 832. The opinion of the court of appeals reviewing the district court's preliminary injunction is reported at 240 F.3d 739.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2005. The court of appeals denied rehearing on June 3, 2005. App., *infra*, 3-4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant text of 42 U.S.C. § 1983 and 42 U.S.C. § 1988 is set forth in the Appendix (App., *infra*, 27-28).

STATEMENT OF THE CASE

The Ninth Circuit has held that this Court's disposition of *American Insurance Ass'n, et al. v. Garamendi*, 539 U.S. 396 (2003), entitles the respondents, a number of insurance companies and an insurance trade association (the "insurers"), to recover attorneys' fees pursuant to 42 U.S.C. § 1988. The Ninth Circuit's decision will wrongly result in the payment of millions of dollars of California taxpayers' money to companies that have repeatedly refused to provide Holocaust survivors with critical insurance policy information.

To be entitled to fees here, the insurers were required to be "prevailing parties" on their 42 U.S.C. § 1983 civil rights claims. The insurers did not prevail on those claims. To the contrary, they lost all of their Section 1983 claims on the merits in the Ninth Circuit, and this Court did not disturb those rulings. The insurers did not vindicate any right, privilege or immunity recognized by Section 1983. They are not civil rights victims.

Nevertheless, the Ninth Circuit has now determined that the insurers are entitled to fees despite their loss on all their Section 1983 claims. The Ninth Circuit reached that erroneous conclusion based on (1) the insurers' success in this Court on a claim – foreign affairs preemption – that does *not* entitle them to fees, and (2) this Court's grant of certiorari on their unsuccessful Section 1983 claims – due process and Commerce Clause – and its subsequent decision not to reach those claims. The Ninth Circuit came to this unprecedented conclusion both because it misconstrued and improperly extended a decision of this Court, *Maher v. Gagne*, 448 U.S. 122 (1980), and because it incorrectly attributed fee significance to this Court's grant of certiorari on Section 1983 claims and its subsequent decision not to address those

claims. The right to Section 1988 attorneys' fees and the intrusion on this Court's discretionary review process are questions of exceptional importance.

The insurers had sued the Commissioner of Insurance for the State of California (the "Commissioner") in four consolidated lawsuits challenging the constitutionality of California's Holocaust Victim Insurance Relief Act, Cal. Ins. Code §§ 13800-13807 (the "HVIRA"). That statute required insurers doing business in California to report information about insurance policies sold by them or related companies in Europe between 1920 and 1945, which would have provided the thousands of Holocaust survivors living in California and their heirs with information necessary to file claims under such policies if they chose to do so. As members of this Court themselves recognized, the HVIRA was enacted following evidence of persistent wrongdoing by insurance companies and the decades-long inability of Holocaust survivors and their families to obtain basic information about insurance policies that may have been issued to Holocaust victims. See *Garamendi*, 539 U.S. at 430-434 (Ginsberg, J., dissenting).

The insurers refused to provide this information and instead sought a declaration that the HVIRA was unconstitutional and an injunction barring the Commissioner from enforcing it.[1] The insurers alleged a variety of constitutional infirmities, including assertions that the statute interfered with the federal government's exercise of its foreign affairs power, violated the Commerce Clause, the Due Process Clause, the Equal Protection Clause, the

[1] The insurers sought relief under both the Declaratory Judgment Act, 28 U.S.C. §§ 2201, *et seq.*, and the Civil Rights Act, 42 U.S.C. § 1983.

Contracts Clause, the Fourth Amendment, and was a bill of attainder.

The district court, ruling on the insurers' foreign affairs and Commerce Clause claims, preliminarily enjoined enforcement of the HVIRA. The Commissioner appealed, and the Ninth Circuit issued a decision that rejected both of those claims, but left the injunction in place and remanded the case for consideration of the insurers' due process claim. *Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739 (9th Cir. 2001) ("*Gerling I*"). On remand, the insurers and the Commissioner each moved for summary judgment. The district court granted the insurers' motion for summary judgment on procedural due process grounds, denied the Commissioner's motion, and enjoined the Commissioner from enforcing the HVIRA.

The insurers then moved the district court for an order that they were entitled to recover attorneys' fees pursuant to Section 1988. The district court, exercising its discretion, denied the insurers' motion for fees. Although it found that the insurers were the prevailing parties, the district court nevertheless concluded that there were special circumstances that would render an award of fees unjust in this case.

The Commissioner appealed to the Ninth Circuit from the grant of summary judgment to the insurers and the denial of his motion for summary judgment. The insurers cross-appealed from the denial of their motion for attorneys' fees.

In *Gerling Global Reinsurance Corp. of Am. v. Low*, 296 F.3d 832 (9th Cir. 2002) ("*Gerling II*"), the Ninth Circuit, ruling that the HVIRA did not violate the Due Process Clause, reversed the grant of summary judgment